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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 01-N-2455 (CBS)

LEVEL 3 COMMUNICATIONS, LLC, a Delaware limited liability company,

Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF COLORADO; Raymond L. Gifford, in his official capacity as Chairman of the Public Utilities Commission of Colorado; Polly Page, in her official capacity as Commissioner of the Public Utilities Commission of Colorado, Jim Dyer, in his official capacity as Commissioner of the Public Utilities Commission of Colorado; and QWEST CORPORATION, a Colorado corporation,

Defendants.

**PLAINTIFF'S REPLY TO RESPONSE BRIEFS IN OPPOSITION
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

Plaintiff Level 3 Communications, LLC (“Level 3”) replies to the Responses filed by the Public Utilities Commission of the State of Colorado and its individual commissioners in their official capacities (collectively “CPUC” or “Commission”), and by Qwest Corporation (“Qwest”). On the sole question before this Court – whether the CPUC’s decision excluding Internet-bound traffic from calculations of the “relative use” of trunks on the Qwest side of its point of interconnection (“POI”) with the Level 3 Communications, LLC (“Level 3”) network is inconsistent with applicable federal law – neither the CPUC nor Qwest demonstrates that the CPUC’s decision complies with Federal Communications Commission (“FCC”) rules as modified by the *ISP Remand Order* and the United States Court of Appeals for the D.C. Circuit’s decision remanding the *ISP Remand Order*. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Remand & Report & Order, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”), remanded by *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002). The CPUC decision to exclude Internet-bound traffic from the standard “relative use” calculation violates FCC rules by permitting Qwest to assess an origination charge for delivering traffic to the POI despite the prohibition on such charges under 47 C.F.R. 51.703(b) (“FCC Rule 51.703(b)”).

As Level 3 has explained in its Memorandum in Support of Plaintiff’s Motion for Summary Judgment and in Plaintiff’s Response to Cross-Motions for Summary Judgment (“Level 3’s Response”), FCC Rule 51.703(b) prohibits an originating carrier such as Qwest from charging interconnecting carriers such as Level 3 for the costs Qwest incurs to bring its

customers' calls to the POI with Level 3. *Id.* The FCC made clear in *TSR Wireless, LLC v. US West Comm., Inc.*, 15 FCC Rcd 11166 (2000) ("*TSR Wireless*"), that this rule applies to both one-way traffic and two-way traffic, so long as the traffic falls within Rule 51.701(b)(1)'s definition of "telecommunications traffic."

Qwest asserts that ISP-bound traffic is "interstate ... access [sic]" and therefore excluded from the definition of "telecommunications traffic." In fact, only "interstate *exchange* access" is excluded, and ISP-bound traffic does not fit the statutory definition of "interstate exchange access," nor has the FCC ruled that ISP-bound traffic is interstate exchange access. Qwest's sole basis in the rules for claiming an exemption from Rule 51.703(b) therefore collapses.

Qwest also continues to persist in claiming that 47 C.F.R. 51.709(b) ("FCC Rule 51.709(b)") requires Level 3 to pay Qwest's costs of carrying calls placed by Qwest's own customers to the POI. *See* Qwest Response at 15. Qwest, however, misreads Rule 51.709(b), which by its plain terms – and by the FCC's stated explanation for adopting the rule – governs allocation of costs to the *termination* charges Qwest could charge to Level 3 for terminating traffic that originated on Level 3's network. Level 3's proposed language in the interconnection agreement on relative use, on the other hand, is fully consistent with the proper reading of Rule 51.709(b).

In any event, the CPUC's decision to exclude ISP-bound traffic from the "relative use" framework is arbitrary and capricious, relying on nothing but circular reasoning and irrelevant – even counterfactual – policy concerns. Accordingly, on the only remaining issue, the Court should grant summary judgment for Level 3 and vacate and remand the CPUC's decision.

II. ARGUMENT

A. After the *ISP Remand Order*, FCC Rule 51.703 Prohibits Origination Charges for All Telecommunications Traffic, Not Just Local Traffic.

1. Rule 51.703 is Not Limited to “Local” Traffic.

Level 3 agrees with the Commission and Qwest that, in reviewing the Commission’s decision, this Court must apply the law, including FCC regulations, as they now stand. *See, e.g.*, CPUC Response at 3. After being modified by the FCC in its *ISP Remand Order*, FCC Rule 51.703(b) states that “[a] LEC *may not* assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network.” 47 C.F.R. § 51.703(b) (emphasis added). Thus, under the plain language of Rule 51.703(b), Qwest cannot charge Level 3 for carrying a call from Qwest’s customer to its POI with Level 3. The FCC made clear in *TSR Wireless* that this rule does not distinguish between one-way and two-way telecommunications traffic, 15 FCC Rcd at 11177-11178 (¶ 21), and that the cost of facilities used to deliver traffic to the POI “is the originating carrier’s responsibility, because these facilities are part of the originating carrier’s network.” *Id.* at 11186 (¶ 35).

Qwest and the CPUC argue that *TSR Wireless* is inapplicable because, in that decision, the FCC limited its discussion to “local” telecommunications traffic. Both Qwest and the CPUC ignore the fact that Rule 51.703(b), as it stood at the time of the *TSR Wireless* decision and prior to amendment in the *ISP Remand Order*, was limited in scope to “local telecommunications traffic.” In the *ISP Remand Order*, however, the FCC deleted the word “local” from Rule 51.703(b). Thus, after the *ISP Remand Order*, Rule 51.703(b) by its plain terms applies to all

telecommunications traffic, not just “local” traffic, and the basis for the distinction offered by Qwest and the CPUC has been removed.

Qwest obfuscates the plain meaning of Rule 51.703(b) by claiming that the facility in question is an “interconnection trunk.” Qwest Response at 18. Rule 51.703(b), however, contains no exception for “interconnection trunks,” *TSR Wireless* specifically disallowed charges for dedicated interconnection trunks, 15 FCC Rcd at 11170 (¶ 8), and Qwest’s assertion that Rule 51.709(b) sets a different rule for interconnection trunks is based on a misreading of that rule. See Section II.B, *infra*.

2. ISP-Bound Traffic Exchanged Between LECs Is “Telecommunications Traffic,” Not “Interstate Exchange Access.”

Qwest misreads the *ISP Remand Order* by arguing that Internet-related traffic is not “telecommunications traffic” within the definition of FCC Rule 51.701(b)(1), but rather that it is “interstate ... access [sic]” and therefore not subject to FCC Rule 51.703(b). See Qwest Response at 15, 24. Although Qwest asserts that the *ISP Remand Order* held that ISP-bound traffic was “interstate ... access [sic],” Qwest provides no citation to any paragraph of that order. In fact, there is no such holding in the *ISP Remand Order*; the FCC did not conclude that ISP-bound traffic is “interstate exchange access.”¹

¹ Although the FCC had ruled in its *Advanced Services Order* that “information access” was a subset of “exchange access,” that decision itself was reversed and remanded. *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd 385, 401-02 (¶ 35) (1999) (“*Advanced Services Order*”), *vacated and remanded by WorldCom, Inc. v. FCC*, 246 F.3d 690, 696 (D.C. Cir. 2001). In the *ISP Remand Order*, the FCC did conclude that ISP-bound traffic exchanged between LECs was “information access.” 16 FCC Rcd at 9165 (¶ 30). However, that conclusion was subsequently reversed by

An examination of the definition of “exchange access” in 47 U.S.C. § 153(16) shows that ISP-bound traffic is not “exchange access.” As defined in the Communications Act, “exchange access” refers to the “offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.” 47 U.S.C. § 153(16). “Telephone toll service” is also a statutorily defined term, meaning “telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.” *Id.* § 153(48). Level 3’s service is not a telephone toll service, and therefore an Internet-related call to a Level 3 ISP customer cannot be “for the purpose of the origination . . . of telephone toll services.” Neither the CPUC *Initial Order*, the CPUC *Reconsideration Order*, nor the FCC’s *ISP Remand Order* reaches a contrary conclusion.²

Thus, Qwest’s assertion that Internet-related traffic is not “telecommunications traffic” subject to FCC Rule 51.703(b) is without merit. Qwest has not demonstrated, and cannot demonstrate, that Internet-related traffic exchanged between Qwest and Level 3 falls into any of the exceptions to the definition of “telecommunications traffic” in FCC Rule 51.701(b)(1). Accordingly, Internet-related traffic is “telecommunications traffic” for which FCC Rule 51.703(b) prohibits Qwest from charging for origination.

the D.C. Circuit in *WorldCom*, 288 F.3d at 434. Qwest apparently recognizes that the *WorldCom* decision overruled the FCC, as it does not argue in its cross-motion or response that ISP-bound traffic is “information access.”

² As noted in Level 3’s Response, the FCC also continues to treat ISP traffic as “local” traffic for many regulatory purposes. *See* Level 3’s Response at 11-12.

3. The *ISP Remand Order* Did Not Alter the Originating Carrier's Duty to Carry Internet-Related Traffic to the POI without Origination Charges.

Even as the FCC asserted jurisdiction over intercarrier compensation for the termination of ISP-bound traffic in the *ISP Remand Order*, it explicitly preserved other regulatory obligations of the originating LEC, including, specifically, the obligation to carry traffic to a single point of interconnection. *See ISP Remand Order*, 16 FCC Rcd at 9187 n.149 (§ 78) (noting that the *ISP Remand Order* “affects only the intercarrier *compensation* (*i.e.*, the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers’ other obligations ... , such as obligations to transport traffic to points of interconnection.”). Thus, the *ISP Remand Order* did not rescind Qwest’s interconnection obligations, including the obligation to carry traffic to the POI without charging for origination.

B. FCC Rule 51.709(b) Does Not Direct Level 3 to Pay Origination Charges to Qwest.

1. The Plain Language of Rule 51.709 Precludes Origination Charges.

Qwest argues that Rule 51.709(b) requires Level 3 to pay Qwest for trunks on Qwest’s side of the POI that are used for interconnection. In arguing that FCC Rule 51.709(b) is “determinative,” Qwest Response at 16 n.43, Qwest misreads this rule as allowing Qwest to charge Level 3 an origination charge, rather than directing Qwest on how to calculate termination charges that Qwest might assess to Level 3 for terminating Level 3-originated traffic. This interpretation stands FCC Rule 51.709(b) on its head, and contravenes the absolute prohibition on origination charges imposed by FCC Rule 51.703(b).

Qwest avoids a close examination of Rule 51.709(b). FCC Rule 51.709(b) states that the carrier “providing transmission facilities dedicated to the transport and termination of traffic

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between two carriers' networks" – in this case, Qwest – "shall recover *only* the costs of the proportion of that trunk capacity used by an interconnecting carrier [*i.e.*, Level 3] to send traffic that will *terminate* on the providing carrier's [*i.e.*, Qwest's] network." 47 C.F.R. § 51.709(b) (emphases added). By its express terms, Rule 51.709(b) limits Qwest to recovery of costs incurred to *terminate* Level 3's traffic over Qwest's facilities, and it precludes Qwest from recovering costs attributable to delivering its originating traffic to the POI over those same facilities. The plain language of Rule 51.709(b) therefore harmonizes with the prohibition on origination charges in Rule 51.703(b).

The FCC's explanations at the time it adopted Rule 51.709(b) help define the rule's meaning. As the FCC explained, "the interconnecting carrier [*i.e.*, Level 3] shall pay the providing carrier a rate that reflects *only* the proportion of the trunk capacity that the interconnecting carrier [*i.e.*, Level 3] uses to send terminating traffic to the providing carrier [*i.e.*, Qwest]." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report & Order, 11 FCC Rcd 15499, 16028 (¶ 1062) (1996) (emphasis added).

2. ISP-Bound Traffic Is Not Excluded from Rule 51.709(b).

Qwest's position that ISP-bound traffic exchanged between LECs is not "traffic" under Rule 51.709(b) lacks merit for the same reasons that it lacked merit with respect to Rule 51.703(b). As discussed in Section II.A.2, *supra*, Qwest cites no support for its argument that ISP-bound traffic is "interstate ... access [*sic*]," its argument runs counter to the statute's definition, and there is no finding below that supports Qwest. Indeed, Rule 51.709(b) uses the

word “traffic,” not “telecommunications traffic,” which is defined in 51.701(b)(1). Without the modifier “telecommunications,” “traffic” should be considered a broader term.

3. Level 3’s Position on “Relative Use” Complies with 51.709(b).

Qwest suggests that Level 3’s agreement to allocate costs of interconnection trunks on Qwest’s side of the POI according to “relative use” is somehow inconsistent with Level 3’s arguments with respect to the plain language of Rules 51.703(b) and 51.709(b). *See* Qwest Response at 18-19. Qwest is incorrect. Level 3 proposed to allocate these trunk costs in proportion to the relative proportion of each carrier’s originating traffic. As these facilities are on Qwest’s side of the POI, allocating costs to Level 3 based on Level 3’s originating minutes establishes the transport and termination payment due from Level 3 to Qwest for terminating traffic originated by Level 3. This is fully consistent with the plain language of Rule 51.709(b), as discussed in Section II.B.1, *supra*.

C. Qwest’s Hobbs Act Argument Is Meritless.

The notion that Level 3 is making a “collateral attack” on FCC orders is fanciful. Level 3 has not asked this Court to “enjoin, set aside, suspend (in whole or in part), or to determine the validity of” any order of the FCC. *See* 28 U.S.C. § 2342. To the contrary, Level 3 is asking the Court to apply FCC rules and precedent – including the *ISP Remand Order* – and hold Qwest to its obligations as articulated in those FCC rules and decisions. In this appeal, Level 3 is properly exercising its rights under 47 U.S.C. § 252(e)(6) of the Act. This Court should swiftly reject Qwest’s arguments to the contrary.

D. The CPUC's Reasoning in Excluding Internet-Related Traffic from Calculation of Relative Use Is Circular and Relies on Misplaced Policy Arguments.

The CPUC's decision to exclude Internet-related traffic from the "relative use" regime relies on a single paragraph that centers on the following reasoning: "When connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the LEC." *Initial Order* at 36. This circular, conclusory justification is presented as if it were self-evident, without any analysis whatsoever. The reality, of course, is that a Qwest end-user who dials a Level 3 ISP is acting both as a customer of the ILEC and as a customer of the ISP, just as a Qwest customer who calls a pizzeria does not cease to be a Qwest customer just because he or she is ordering a pizza. Qwest charges its customers a local service rate, and in return commits to completing the customers' calls. When those calls are placed to an ISP, there is no logical justification for shifting the costs of origination to the ISP via the carrier serving the ISP. Notably, Qwest does not attempt to defend the Commission's decision on this ground.

The *ISP Remand Order* raised a concern about regulatory arbitrage in revising the *terminating* compensation structure applicable to ISP-bound traffic that is superficially – but only superficially – similar to the CPUC's decision. In essence, the FCC decided to prevent regulatory arbitrage opportunities by adopting a "bill and keep" regime, forcing carriers to bear their own costs for the termination of traffic. The FCC specifically preferred this regime because it would force terminating carriers to recover termination costs from their own customers, and not from other carriers. *ISP Remand Order*, 16 FCC Rcd at 9184 (¶ 73). The FCC was not at all concerned with the possibility that *originating* carriers would use regulatory arbitrage to force

terminating carriers to subsidize their costs of carrying originating traffic to the POI, because the FCC noted that “[a] carrier must provide originating switching functions and must recover the costs of those functions from the originating end-user, not from other carriers. Originating traffic thus lacks the same opportunity for cost-shifting that reciprocal compensation provides” *Id.* By excluding Internet-related traffic from the “relative use” framework, however, the CPUC has allowed Qwest to charge Level 3 for the *origination* of calls. This is entirely contrary to the FCC’s definition of “bill and keep,” under which both originating and terminating carriers are presumed to recover their own costs from their own customers. *See ISP Remand Order*, 16 FCC Rcd at 9153 n.6 (¶ 2). The CPUC, therefore, has reintroduced the sort of unfair cost-shifting opportunities that the FCC sought to prevent, because Qwest will be able to shift its costs of originating traffic to Level 3.

III. CONCLUSION

This Court should reject the motions of Qwest and the CPUC for summary judgment, grant Level 3’s motion for summary judgment, and vacate and remand the CPUC’s decision.

DATED this 25th day of October, 2002.

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I hereby certify that I served the foregoing PLAINTIFF' REPLY TO RESPONSE BRIEFS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT upon all parties herein by depositing copies of the same in the United States mail, first class postage prepaid, or as otherwise indicated, on this 25th day of October, 2002, addressed to the following:

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